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ACTION
OCA 87-3437

OFFICE OF CONGRESSIONAL AFFAIRS

Routing Slip

	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	XX	
3. DD/Senate Affairs		X
4. Ch/Senate Affairs		
5. DD/House Affairs		X
6. Ch/House Affairs		
7. Admin Officer		
8. Executive Officer		
9. FOIA Officer		
10. Constituent Inquiries Officer		
11.		X
12.		

SUSPENSE 17 Aug 87
Date

STAT

Action Officer:

STAT

Remarks:

10 Aug 87
Name/Date

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87-3437
OCA FILE

THE WHITE HOUSE

WASHINGTON

August 7, 1987

MEMORANDUM FOR DAVID MATTHEWS
LEGISLATIVE DIRECTOR
NATIONAL SECURITY COUNCIL

[redacted] STAT
GENERAL COUNSEL
DEFENSE INTELLIGENCE AGENCY

ROBERT J. WINCHESTER
SPECIAL ASSISTANT TO
THE SECRETARY OF THE ARMY

[redacted] STAT
OFFICE OF CONGRESSIONAL AFFAIRS
CENTRAL INTELLIGENCE AGENCY

FROM: DAVID S. ADDINGTON
SPECIAL ASSISTANT TO THE PRESIDENT
FOR LEGISLATIVE AFFAIRS

SUBJECT: Defense Intelligence Commercial Entities Act
(H.R. 3150)

On August 6, 1987, Congressman Andy Ireland, who serves currently on the House Armed Services Committee and who served previously on the House Permanent Select Committee on Intelligence, introduced the Defense Intelligence Commercial Entities Act (H.R. 3150). The legislation would authorize the Department of Defense to establish commercial entities to provide cover for DOD foreign intelligence collection activities.

The Ireland bill is based generally on an Administration legislative request submitted to Congress as part of the proposed intelligence authorization bill in each of the last three years. It is identical in substance to H.R. 3963 of the 99th Congress, introduced by then-Congressman Bill Whitehurst.

Congressman Ireland has asked for formal Administration views on the bill on an expedited basis, as he plans to pursue it actively when the Congress returns from the August recess.

Your agencies will receive the enclosed items from the Office of Management and Budget through the usual process, but I thought advance copies might be helpful to you.

Enclosures: H.R. 3150
Section-by-Section Explanation
Views letter request

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ANDY IRELAND
10TH DISTRICT, FLORIDA

COMMITTEE ON
ARMED SERVICES

SUBCOMMITTEES:
PROCUREMENT AND
MILITARY NUCLEAR SYSTEMS
INVESTIGATIONS

COMMITTEE ON
SMALL BUSINESS

SUBCOMMITTEE:
VICE CHAIRMAN
EXPORTS, TOURISM, AND
SPECIAL PROBLEMS

Congress of the United States
House of Representatives
Washington, DC 20515

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1803 RICHMOND ROAD AT BARTOW HIGHWAY
P.O. BOX 8758
LAKELAND, FL 33803
(813) 687-8018

August 7, 1987

Honorable James C. Miller, III
Director
Office of Management and Budget
Old Executive Office Building
Washington, D.C. 20503

Dear Jim:

Yesterday I introduced the H.R. 3150, The Defense Intelligence Commercial Entities Act. The bill authorizes the Secretary of Defense to establish and operate commercial entities to provide cover for Department of Defense foreign intelligence collection activities. The bill will improve the ability of DOD intelligence components to provide the timely and accurate intelligence that the U.S. Armed Forces and defense agencies need to accomplish their missions.

The bill is based substantially upon legislation submitted as part of the Administration's official request for intelligence authorization legislation in each of the past three years. We have modified the legislationto ensure proper accountability and control of the commercial cover authority.

Copies of the legislation and the accompanying section by section explanation are enclosed.

We request the Administration's views and detailed comments on H.R. 3150. Prompt receipt of that information would be greatly appreciated.

Sincerely,

ANDY IRELAND, M.C.

API:jg

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ANDY IRELAND
10TH DISTRICT, FLORIDA

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(813) 687-8018

August 7, 1987

Honorable Caspar Weinberger
Secretary
Department of Defense
The Pentagon
Washington, D.C. 20301

Dear Cap:

Yesterday I introduced the H.R. 3150, The Defense Intelligence Commercial Entities Act. The bill authorizes the Secretary of Defense to establish and operate commercial entities to provide cover for Department of Defense foreign intelligence collection activities. The bill will improve the ability of DOD intelligence components to provide the timely and accurate intelligence that the U.S. Armed Forces and defense agencies need to accomplish their missions.

The bill is based substantially upon legislation submitted as part of the Administration's official request for intelligence authorization legislation in each of the past three years. We have modified the legislationto ensure proper accountability and control of the commercial cover authority.

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ANDY IRELAND
10TH DISTRICT, FLORIDA

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LAKELAND, FL 33803
(813) 687-8018

August 7, 1987

Honorable William Webster
Director
Central Intelligence Agency
Washington, D.C. 20505

Dear Bill:

Yesterday I introduced the H.R. 3150, The Defense Intelligence Commercial Entities Act. The bill authorizes the Secretary of Defense to establish and operate commercial entities to provide cover for Department of Defense foreign intelligence collection activities. The bill will improve the ability of DOD intelligence components to provide the timely and accurate intelligence that the U.S. Armed Forces and defense agencies need to accomplish their missions.

The bill is based substantially upon legislation submitted as part of the Administration's official request for intelligence authorization legislation in each of the past three years. We have modified the legislationto ensure proper accountability and control of the commercial cover authority.

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We request the Agency's views and detailed comments on H.R. 3150. Prompt receipt of that information would be greatly appreciated.

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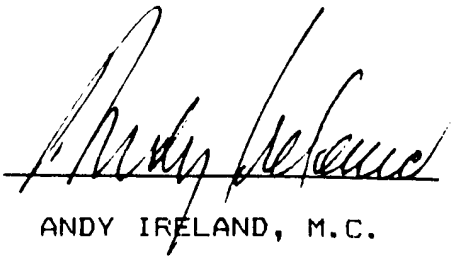

ANDY IRELAND, M.C.

DEFENSE INTELLIGENCE COMMERCIAL ENTITIES ACT

MR. SPEAKER, I have introduced the Defense Intelligence Commercial Entities Act to provide for improvements in cover for the foreign intelligence collection activities of the Department of Defense. The legislation is substantially similar to H.R. 3963 of the 99th Congress, which was introduced by our former colleague Bill Whitehurst of Virginia.

For the past three years, the Secretary of Defense and the Director of Central Intelligence have requested legislation to permit the Department of Defense to establish commercial entities to provide cover for defense foreign intelligence collection activities, particularly for use in those areas of the world in which other types of cover are either not available or not effective.

The legislation I have introduced provides the authority requested by the executive branch, with addition of appropriate safeguards to ensure effective and proper use of the authority and effective oversight of its use.

The section by section explanation of the legislation follows:

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DEFENSE INTELLIGENCE COMMERCIAL ENTITIES ACT

SECTION-BY-SECTION EXPLANATION

The bill consists of two sections. Section 1 provides that the short title of the Act is the "Defense Intelligence Commercial Entities Act." Section 2(a) enacts a new subchapter II in chapter 21 of Title 10 of the United States Code to provide cover for Department of Defense foreign intelligence collection activities through the establishment and operation of commercial entities. Section 2(b) provides that amendments to Title 10 made by the legislation take effect ninety days after enactment of the legislation, except for the provision for implementing regulations, which takes effect upon enactment.

The provisions of subchapter II of chapter 21 of Title 10 of the United States Code (consisting of Sections 431 through 439) enacted by Section 2(a) of the bill are explained below.

Section 431

Section 431(a)(1) grants to the Secretary of Defense the authority to establish and operate commercial entities to provide cover for foreign intelligence collection activities of the Department of Defense (DOD) in accordance with the provisions of the subchapter. Such commercial entities will conceal foreign intelligence collection activities under cover of the overt function of the commercial entity. The legislation refers to such a DOD entity as an "intelligence commercial entity."

The legislation authorizes establishment of intelligence commercial entities only to provide cover for and to engage in DOD foreign intelligence activities, and does not authorize establishment of such entities to provide cover for or to engage in any intelligence activities other than foreign intelligence collection activities. Thus, for example, DOD may not establish such entities to provide cover for or to engage in counterintelligence operations (as distinguished from the collection of counterintelligence information) or covert action, or to provide cover for or to engage in non-intelligence DOD activities.

Section 431(a)(2) provides that the Secretary of Defense may initially authorize the establishment and operation of an intelligence commercial entity for any period not to exceed two years. At the expiration of a previously authorized period for operation of such an entity, the Secretary may renew the authority to operate the entity for an additional period not to exceed two years. The number of successive periods for which the

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Secretary may authorize operation of such an entity is not limited.

Section 431(b) provides that the Secretary may not authorize establishment and operation of an intelligence commercial entity, or renew authority to operate such an entity, unless the Attorney General and the Director of Central Intelligence concur and the Secretary certifies in writing that operation of the entity is essential to the conduct of an authorized foreign intelligence collection activity of the Department of Defense.

The requirement for the concurrence of the Attorney General ensures an independent high-level legal review of plans for establishment and operation of an intelligence commercial entity, and ensures the harmony of the plans with the intelligence, counterintelligence, and law enforcement functions of components of the Department of Justice. The requirement for the concurrence of the Director of Central Intelligence ensures that the plans will be consistent with national intelligence needs and ensures the harmony of the plans with the intelligence, counterintelligence, and special activities of other elements of the U.S. intelligence community.

To authorize establishment and operation of an intelligence commercial entity, or to renew authority to operate such an entity, the Secretary of Defense must certify in writing that operation of the entity is essential to the conduct of an authorized foreign intelligence collection activity of the Department of Defense. Thus, the Secretary may authorize establishment and operation of an entity, or renew authority to operate an entity, only when no reasonable and effective alternative method exists for carrying out an authorized DOD foreign intelligence collection activity.

Section 431(c) provides that the Secretary of Defense may terminate an intelligence commercial entity at any time. The Secretary's authority to terminate an entity is not conditioned upon any concurrence or certification.

The grant of authority to the Secretary of Defense to establish intelligence commercial entities to provide cover for DOD foreign intelligence collection activities does not affect any authority for the Department of Defense to obtain cover or other support for its foreign intelligence collection activities from other Federal agencies.

Section 432

Section 432 grants to the Secretary of Defense authority to acquire, use, and dispose of property and services needed in the establishment, operation, and termination of intelligence commercial entities. The broad authority granted ensures that the

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Secretary can provide the necessary administrative support for such entities.

In addition to requiring administrative support common to any government instrumentality, such as workspace, equipment, and personal services, an intelligence commercial entity will require special administrative support due to its commercial function and appearance. Thus, for example, such an entity may require private legal services, commercial and occupational licenses, private liability insurance, and private banking services. Section 432 ensures that the Secretary can meet the full range of administrative support needs of an intelligence commercial entity, including its unusual needs that stem from its ostensibly commercial status.

The authority granted by Section 432 is independent of, and in addition to, any other acquisition, use, or disposal authority available to the Secretary of Defense.

Section 433

Section 433 ensures that the handling and use of funds in connection with intelligence commercial entities will be consistent with the ostensible commercial status of those entities.

Section 433(a) permits the Secretary of Defense to establish and maintain commercial banking accounts in the establishment, operation, and termination of intelligence commercial entities. The authority to use commercial banking services applies both with respect to appropriated funds used in connection with an intelligence commercial entity and with respect to funds generated by the commercial activities of that entity.

Section 433(b) permits use of funds generated by the commercial activities of an intelligence commercial entity to offset the necessary and reasonable expenses incurred by that entity. The funds generated by a particular entity may only be used to offset the expenses of that particular entity.

Section 433(c)(1) provides that funds generated by an intelligence commercial entity that are no longer needed for the conduct of the intelligence or commercial activities of that entity shall be remitted to the Treasury as miscellaneous receipts.

Section 433(c)(2) provides for the disposition of the proceeds which result from the termination of an intelligence commercial entity. After all outstanding obligations of the entity are met, the remaining proceeds shall be deposited in the Treasury as miscellaneous receipts.

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Section 433 displaces several limitations contained in Section 3302 of Title 31 of the United States Code on governmental use of funds. Observance of those limitations would be inconsistent with the ostensible commercial status of intelligence commercial entities.

Section 434

Section 434(a) provides that establishment, operation, and termination of an intelligence commercial entity; acquisition, use, or disposition of property and services with respect to such an entity; and deposit, withdrawal, and use of funds with respect to an entity shall be carried out in accordance with prevailing commercial practices, consistent with the protection of intelligence sources, methods, and activities from unauthorized disclosure.

To maintain its usefulness as a cover for foreign intelligence collection activities, an intelligence commercial entity must maintain commercial credibility. The entity must appear to anyone who scrutinizes it to be a bona fide commercial entity, rather than an instrumentality of the United States Government. Accordingly, the entity must conduct its commercial activities in the same manner as would a private sector commercial entity. Circumstances may arise, however, in which observing prevailing commercial practices would not be consistent with the protection of intelligence sources, methods, and activities from unauthorized disclosure, and in such cases prevailing commercial practices would not be observed, because the protection of intelligence sources, methods, and activities is of paramount importance.

Section 434(b) provides that establishment, operation, and termination of an intelligence commercial entity; acquisition, use, or disposition of property and services with respect to such an entity; and deposit, withdrawal or use of funds with respect to such an entity, may be carried out without regard to certain requirements of Federal statutes to the extent necessary to protect intelligence sources, methods, and activities from unauthorized disclosure. The provision grants to the Secretary of Defense extraordinary authority to waive the applicability to an intelligence commercial entity of requirements in a broad spectrum of Federal statutes to the extent necessary to protect intelligence sources, methods, and activities from unauthorized disclosure. Without the waiver authority, an intelligence commercial entity would be obliged to observe Federal statutes that normally apply to U.S. Government instrumentalities but do not apply to a bona fide commercial entity. Such inconsistency between the conduct of an entity and its ostensible private commercial status might reveal to an interested observer, such as an intelligence or security service of a foreign power, that the entity is not what it claims to be, risking the compromise of commercial cover and of the foreign intelligence collection activities of the entity.

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Section 434(c) enumerates the categories of statutes subject to the waiver authority, which are those related to Federal appropriations, Federal receipt and use of funds other than appropriated funds, Federal acquisitions, Federal property management, Federal services management, Federal information management, Federal tort claims, Federal employment, or Federal government corporations. A statute within those categories ceases to apply if, and to the extent that, the Secretary of Defense certifies that compliance with the statute would be inconsistent with the protection of intelligence sources, methods, or activities from unauthorized disclosure. A statute is waived only to the extent that compliance would be inconsistent with such protection. Thus, the Secretary's authority extends not to blanket waiver of the applicability of the statute, but only to waiver of the applicability of the particular requirements of that statute which would be inconsistent with the protection of intelligence sources, methods, or activities from unauthorized disclosure (which may, in some cases, amount to waiver of the applicability of the entire statute).

Section 434 makes clear that the Secretary's waiver authority does not apply with respect to the subchapter enacted by this legislation (subchapter II of chapter 21 of Title 10 of the United States Code), with respect to Title V of the National Security Act of 1947 (which relates to congressional oversight of intelligence activities), or with respect to the War Powers Resolution. Nothing in the legislation in any way limits the role of the Congress in oversight of intelligence activities and military activities.

Section 435

Section 435(a) makes clear that the subchapter enacted by the legislation (subchapter II of chapter 21 of Title 10 of the Untied States Code) does not constitute authority for the conduct of intelligence activities other than those expressly authorized by the subchapter. Thus, the subchapter provides authority for establishment and use of intelligence commercial entities to provide cover for DOD foreign intelligence collection activities, but does not provide the authority for those underlying foreign intelligence collection activities.

Section 435(b) establishes clear limitations on the activities of intelligence commercial entities and their personnel within the United States. They may engage within the United States only in training, administration, and recruitment of non-U.S. persons to serve subsequently outside the United States in foreign intelligence collection activities as sources of intelligence information or of operational assistance. Administration which intelligence commercial entities may conduct

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within the United States includes the full range of support activities necessary to establish, operate, and terminate a commercial entity, such as finance, logistics, and procurement. The limitation of domestic activity to training, administration, and recruitment of sources for service abroad ensures that intelligence commercial entities within the United States will have strictly a foreign focus and will not engage in domestic intelligence activities.

Section 435(c) provides that no intelligence commercial entity may have as its overt activity communications media activity, religious activity, munitions production or marketing, or security-related services.

The prohibition against the overt activity of an intelligence commercial entity being communications media activity protects against the possibility of media activity by an entity having an accidental or intentional effect on U.S. domestic political processes. The prohibition prevents establishment of intelligence commercial entities to engage in commercial radio or television broadcasting; newspaper, book or magazine publishing; or wire services. The prohibition does not prevent incidental commercial use of communications media by an entity if prevailing commercial practices so require. Thus, for example, if an entity is engaged in a cover business of a type in which one would normally place commercial advertisements or solicitations in a local newspaper, the entity may do so.

The prohibition against the overt activity of an intelligence commercial entity being religious activity protects the integrity of religious freedom and religious institutions.

The prohibitions against the overt activity of an intelligence commercial entity being production or marketing of munitions, or being security-related services, prevent the possibility of use of such an entity to circumvent United States arms transfer policies or to implement those policies. The Arms Export Control Act, the Foreign Assistance Act, and the statutory mechanisms for covert arms transfers govern the transfer of defense articles and services. The prohibitions do not in any way prohibit the personnel of an intelligence commercial entity from defending themselves.

Section 435(d) requires that every U.S. person employed by, or assigned or detailed to, an intelligence commercial entity be informed prior to employment, assignment, or detail that the entity is an instrumentality of the United States engaged in foreign intelligence collection activities. The provision thus prohibits unwitting employment, assignment, or detail of United States persons.

Section 435(e) defines U.S. persons for purposes of Section 435 as U.S. citizens and aliens admitted to permanent residence in the United States.

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Section 436

Section 436(a) requires the Secretary of Defense, after consultation with the Attorney General and the Director of Central Intelligence, to prescribe regulations to implement the legislation and specifies a number of requirements which those regulations must satisfy.

The Secretary's regulations must provide for effective centralized oversight by the Office of the Secretary of Defense of the use of the authority for intelligence commercial entities granted by the legislation. The requirement for centralization of the internal oversight role promotes consistency among DOD components in establishing policies and practices concerning intelligence commercial entities and facilitates effective oversight of intelligence commercial entities by appropriate non-DOD entities, such as the Congress. The requirement that the internal oversight role occur at the departmental level, rather than at the lower level of the individual military departments, defense agencies, or other components which may use intelligence commercial entities, ensures appropriate high-level attention within the Department of Defense to any problems which may come to light in the course of internal oversight activities.

The Secretary's regulations must provide management, operational, security, legal, and accounting controls for all matters relating to intelligence commercial entities. The Secretary's careful design and establishment of strict controls will be of critical importance, especially given that such controls often may replace statutory controls which the legislation authorizes the Secretary to waive in certain circumstances.

The Secretary's regulations must provide for appropriate coordination of the activities of intelligence commercial entities with the Department of State, the Federal Bureau of Investigation, and the Central Intelligence Agency, which have primary responsibility for foreign policy, counterintelligence and law enforcement within the United States, and intelligence and counterintelligence outside the United States, respectively.

The Secretary's regulations must ensure compliance with the subchapter enacted by the legislation (subchapter II of chapter 21 of Title 10 of the United States Code), with Title V of the National Security Act of 1947 (relating to Congressional oversight of intelligence activities), and with the War Powers Resolution.

Section 436(b) requires the Inspector General of the Department of Defense to conduct, at least annually, a review of activities undertaken under the subchapter enacted by the legislation (subchapter II of chapter 21 of Title 10 of the

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United States Code). Each such review must include, but is not limited to, an the programs and operations of intelligence commercial entities and a financial audit of the activities of such entities. The Inspector General must report on the reviews to the Secretary of Defense and the intelligence committees of the Congress.

Section 437

Section 437(a) provides that intelligence commercial entities are instrumentalities of the United States. As such, they enjoy within the constitutional scheme the same immunities and privileges enjoyed by other Federal instrumentalities. Thus, for example, they share in the sovereign immunity to suit of the United States Government to the same extent as other Federal instrumentalities.

Section 437(b)(1) explicitly preempts the applicability of State laws to, and the jurisdiction of State courts over, intelligence commercial entities. Thus, intelligence commercial entities will be subject exclusively to Federal law and court jurisdiction.

Section 437(b)(2) provides that, although intelligence commercial entities are not subject to State law and State court jurisdiction, they may engage in conduct which appears to comply with State laws and State court jurisdiction, if the Secretary of Defense certifies that doing so is necessary to protect intelligence sources, methods, or activities from unauthorized disclosure or is necessary in the interests of justice.

Under this authority, with the appropriate certification, an intelligence commercial entity may engage in conduct which appears to comply with State laws in the same manner as would a bona fide commercial entity. Thus, for example, if the Secretary certifies that protection of intelligence sources, methods, or activities requires doing so, an intelligence commercial entity could incorporate in a State in the same manner as a bona fide commercial entity, even though that State's incorporation laws do not actually apply to the entity and even though those laws do not provide for incorporation by Federal instrumentalities. Similarly, even though Federal instrumentalities are not subject to State taxation, if the Secretary makes the appropriate certification, an intelligence commercial entity may file State tax returns and remit State taxes.

With the appropriate certification, an intelligence commercial entity may engage in conduct which appears to submit to State court jurisdiction in the same manner as would a bona fide commercial entity. Thus, for example, if the Secretary certifies that protection of intelligence sources, methods, or activities, or the interests of justice, require doing so, an

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intelligence commercial entity might participate in a lawsuit in State court based on breach of a commercial contract in the same manner as would a bona fide commercial entity.

The Department of Defense may well make substantial use of the authority for intelligence commercial entities to engage in conduct appearing to comply with State commercial laws, since it may become the Department's practice to establish such entities by incorporation or registration under the laws of the several States. In contrast, the Department should only rarely need to use the authority for intelligence commercial entities to engage in conduct appearing to submit to the jurisdiction of a State court, because the authorized activities of such entities within the United States are quite restricted, and thus are not likely to give rise to many situations in which appearing to submit to State court jurisdiction would be appropriate.

Section 437(c) provides that, for the purposes of Section 437, the term "State" means any State, the District of Columbia, and any territory, commonwealth, or possession of the United States.

Section 438

Section 438 provides that the Secretary of Defense may delegate his authority, functions, and duties under sections 431(a), 434(b), 436(a), and 437(b) of Title 10 of the United States Code, as enacted by the legislation, only to the Deputy Secretary of Defense. By requiring that only the Secretary or the Deputy Secretary of Defense may exercise the authority, functions, and duties set forth in these subsections, the legislation ensures high-level attention to particularly sensitive decisions involving intelligence commercial entities.

Under Section 438, the Secretary may delegate only to the Deputy Secretary the authority to authorize establishment and operation of an intelligence commercial entity, or to renew authorization for operation of such an entity (Sec. 431(a)); the authority to waive the applicability of certain Federal statutes based upon the requisite certification (Sec. 434(b)); the authority to issue implementing regulations (Sec. 436(a)); and the authority to permit intelligence commercial entities to appear to comply with State laws and to appear to submit to State court jurisdiction (Sec. 437(b)). Authorities, duties, and functions provided in the legislation, other than those specifically cited in Section 438, are subject to delegation in accordance with Section 113(d) of Title 10 of the United States Code.

The limitation on delegation of certain specified authorities, duties, and functions will not place an inordinate administrative burden on the Secretary and the Deputy Secretary. Exercise of the authority to authorize establishment and

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operation of an intelligence commercial entity will occur only once for each entity, and subsequent renewals of authority to operate such entities will occur only when the previously authorized period of operation expires. Exercise of the authority to waive various Federal statutory requirements applicable to an entity, to authorize apparent compliance with State laws, and to authorize apparent submission to State court jurisdiction, will often accompany the authorization to establish and operate the entity, although changes with respect to an entity may be necessary from time to time. Exercise of the authority to issue implementing regulations should occur only once, with changes to such regulations thereafter occurring only occasionally, as experience demands. The greatest administrative burden upon the Secretary and the Deputy Secretary will thus occur at the time of creation of an intelligence commercial entity, when the nature and the scope of its activities and the legal regime governing it are established. Cabinet-level involvement in decisions of such sensitivity at that time is appropriate.

Section 439

Section 439 defines the terms "commercial entity," "foreign intelligence collection activities," and "intelligence activities" as used in subchapter II of chapter 21 of Title 10 of the United States Code, as enacted by the legislation.

The definition of "commercial entity" comprehends all forms of legal entities, whether within or outside the United States, that are non-governmental in appearance. The term is used in Section 431.

The definition of "foreign intelligence collection activities" comprehends only collection by Department of Defense components, such as the military departments or defense agencies, of foreign intelligence or counterintelligence information, and related support activities. It does not include any other types of intelligence activities, such as counterintelligence operations or covert action. The legislation authorizes establishment and authorization of intelligence commercial entities only to provide cover for foreign intelligence collection activities. The term is used in Sections 431 and 435.

The definition of "intelligence activities" comprehends all intelligence and intelligence-related activities of the United States Government. The term is used in Section 435.

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100th CONGRESS
1st SESSION

(Original signature of Member)

H.R. 3150

H.L.C.

Insert title here

To amend title 10, United States Code, to authorize the Secretary of Defense to provide cover for Department of Defense foreign intelligence collection activities through the establishment and operation of commercial entities, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Aug 6, 1987

Insert sponsor's name here

Mr. Ireland introduced the following bill; which was referred to the Committee on _____

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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That this Act may be cited as the ``Defense Intelligence Commercial Entities Act''.

SEC. 2. (a) Chapter 21 of title 10, United States Code, is amended--

(1) by inserting after the chapter heading the following:

``Subchapter Sec.
``I. General Matters.....421
``II. Intelligence Commercial Entities.....431

``SUBCHAPTER I--GENERAL MATTERS''; and

(2) by adding at the end the following:

``SUBCHAPTER II--INTELLIGENCE COMMERCIAL ENTITIES

``Sec.
``431. Intelligence commercial entities: establishment, operation, and termination.
``432. Intelligence commercial entities: administrative support.
``433. Use and disposition of funds.
``434. Use of prevailing commercial practices.
``435. Intelligence commercial entities: limitations on activities.
``436. Oversight, accountability, and coordination within the executive branch.
``437. Intelligence commercial entities: status; relationship to State law.
``438. Delegation of authority: limitation.
``439. Definitions.

``§431. Intelligence commercial entities: establishment, operation, and termination

``(a)(1) Subject to subsection (b), the Secretary of Defense may authorize the establishment and the operation in accordance with the provisions of this subchapter of

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commercial entities to provide cover for foreign intelligence collection activities of the Department of Defense. Any such commercial entity (hereinafter in this subchapter referred to as an `intelligence commercial entity') may be established and operated solely to conceal foreign intelligence collection activities under cover of the overt function of the commercial entity.

``(2) An intelligence commercial entity established under paragraph (1) may not be operated for a period in excess of two years. The Secretary of Defense may renew the authorization to operate such entity for additional periods of not to exceed two years each.

``(b) The Secretary of Defense may not establish an intelligence commercial entity under subsection (a)(1) or renew such entity under subsection (a)(2) unless--

``(1) the Attorney General and the Director of Central Intelligence concur; and

``(2) the Secretary of Defense certifies in writing that operation of the entity is essential to the conduct of an authorized foreign intelligence collection activity of the Department of Defense.

``(c) The Secretary of Defense may terminate an intelligence commercial entity at any time.

``§432. Intelligence commercial entities: administrative support

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``The Secretary of Defense may acquire, use, and dispose of goods, services, real property, personal property, intangible property, buildings, facilities, space, insurance, licenses, and supplies to establish, operate, and terminate an intelligence commercial entity.

``§433. Use and disposition of funds

``(a) The Secretary of Defense may deposit in, and withdraw from, banks and other financial institutions--

``(1) funds appropriated to the Department of Defense that are used to establish, operate, or terminate an intelligence commercial entity; and

``(2) funds generated by such an entity.

``(b) Funds generated by such an entity may be used to offset necessary and reasonable expenses incurred by that entity.

``(c)(1) Funds generated by such an entity that are no longer necessary for the conduct of the activities of that entity shall be deposited in the Treasury as miscellaneous receipts as soon as practicable.

``(2) Upon the termination of such an entity, the proceeds from that entity, after all obligations of that entity are met, shall be deposited in the Treasury as miscellaneous receipts.

``§434. Use of prevailing commercial practices

``(a)(1) Activities set forth in paragraph (2) shall be

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carried out in accordance with prevailing commercial practices, consistent with the protection of intelligence sources, methods, and activities from unauthorized disclosure.

``(2) The activities to which paragraph (1) refers are--

``(A) the establishment, operation, and termination of an intelligence commercial entity;

``(B) any acquisition, use, or disposition authorized by or pursuant to section 432 of this title with respect to such entity; and

``(C) any deposit, withdrawal, or use of funds authorized by or pursuant to section 433 of this title with respect to such entity.

``(b) An activity set forth in subsection (a)(2) shall not be subject to any Federal statute described in subsection (c) if, and to the extent that, the Secretary of Defense certifies in writing that compliance with such statute would be inconsistent with the protection of intelligence sources, methods, and activities from unauthorized disclosure.

``(c) Subsection (b) applies to any Federal statute (other than this subchapter, title V of the National Security Act of 1947 (50 U.S.C. 413 et seq.), and the War Powers Resolution (50 U.S.C. 1541 et seq.)) that is applicable to any of the following:

``(1) Federal appropriations.

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``(2) Federal receipt and use of funds other than appropriated funds.

``(3) Federal acquisitions.

``(4) Federal property management.

``(5) Federal services management.

``(6) Federal information management.

``(7) Federal tort claims.

``(8) Federal employment.

``(9) Federal Government corporations.

``§435. Intelligence commercial entities: limitations on activities

``(a) Nothing in this subchapter shall be deemed to constitute authority for the conduct of intelligence activities (other than those expressly authorized by this subchapter) which are not otherwise authorized by or pursuant to law.

``(b) An intelligence commercial entity, and the personnel of that entity, may not engage in intelligence activities within the United States other than--

``(1) training;

``(2) administration; or

``(3) recruitment of individuals who are not United States persons to serve subsequently as intelligence sources outside the United States in foreign intelligence collection activities.

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``(c) An intelligence commercial entity may not have as its overt activity any of the following:

``(1) Communications media activity.

``(2) Religious activity.

``(3) Munitions production or marketing.

``(4) Security-related services.

``(d) A United States person may not be employed by, or assigned or detailed to, an intelligence commercial entity unless that person has been informed that the entity is an instrumentality of the United States engaged in foreign intelligence collection activities.

``(e) In this section, the term `United States person' means a citizen of the United States or an alien admitted to permanent residence in the United States.

``§436. Oversight, accountability, and coordination within the executive branch

``(a)(1) The Secretary of Defense, after consultation with the Attorney General and the Director of Central Intelligence, shall prescribe regulations to implement this subchapter.

``(2) Such regulations shall include provisions to ensure the following:

``(A) Oversight within the Office of the Secretary of Defense of the use of authority granted by or pursuant to this subchapter.

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``(B) Management, operational, security, legal, and accounting controls in the use of such authority.

``(C) Coordination of the activities of intelligence commercial entities with the Department of State, the Federal Bureau of Investigation, and the Central Intelligence Agency.

``(D) Compliance with this subchapter, title V of the National Security Act of 1947 (50 U.S.C. 413 et seq.), and the War Powers Resolution (50 U.S.C. 1541 et seq.).

``(b)(1) At least once a year, the Inspector General of the Department of Defense shall review the activities undertaken under this subchapter, including the establishment, operation, and termination of intelligence commercial entities. Each such review shall include--

``(A) an evaluation of programs and operations; and

``(B) a financial audit of such activities.

``(2) The Inspector General shall submit a report on each review under paragraph (1)--

``(A) to the Secretary of Defense; and

``(B) to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

``§437. Intelligence commercial entities: status; relationship to State law

``(a) Intelligence commercial entities are

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``(b)(1) An intelligence commercial entity which is incorporated, registered, or doing business in, or which otherwise has contacts with, a State shall not be subject to the laws of that State or to the jurisdiction of the courts of that State.

``(2) If the Secretary of Defense certifies in writing that to do so is necessary to protect intelligence sources, methods, or activities from unauthorized disclosure or is necessary in the interests of justice, an intelligence commercial entity described in paragraph (1)--

``(A) may engage in conduct which appears to comply with the laws of that State relating to accounting, banking, contracts, employment, finance, incorporation, registration, taxation, tort liability, and other regulation of commercial activities as if the entity were subject to such laws; and

``(B) may engage in conduct which appears to submit to the jurisdiction of the courts of that State as if the entity were subject to such jurisdiction.

``(c) In this section, the term `State' means any of the several States, the District of Columbia, and any territory, commonwealth, or possession of the United States.

``§438. Delegation of authority: limitation

``Notwithstanding section 113(d) of this title, the

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Secretary of Defense may delegate his authority, functions, and duties under sections 431(a), 434(b), 436(a), and 437(b) of this title only to the Deputy Secretary of Defense.

``**§439. Definitions**

``In this subchapter:

``(1) The term `commercial entity' means a corporation, foundation, company, firm, partnership, association, society, joint venture, sole proprietorship, or other legal entity which is nongovernmental in appearance, within or outside the United States.

``(2) The term `foreign intelligence collection activities' means the collection of foreign intelligence or counterintelligence information, and related support activities, by a component of the Department of Defense.

``(3) The term `intelligence activities' means--

``(A) the collection of foreign intelligence or counterintelligence information;

``(B) the conduct of counterintelligence operations;

``(C) the conduct of covert action;

``(D) support activities; and

``(E) any other intelligence or intelligence-related activity of the United States.''.

(b)(1) Except as provided by paragraph (2), subchapter II

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of chapter 21 of title 10, United States Code, as added by subsection (a), shall take effect at the end of the 90-day period beginning on the date of the enactment of this Act.

(2) Section 436(a) of such title (relating to regulations) shall take effect on the date of the enactment of this Act.

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